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No. 02-608

In the Supreme Court of the United States

JEFFREY A. BEARD, Ph.D., Warden S.C.I. Camp Hill; THE DISTRICT ATTORNEY OF PHILADELPHIA, Lynn Abraham; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA, Mike Fisher,

Petitioners,

v.

GERALD EVERETT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Did the Third Circuit correctly apply a de novo standard of review because the state courts ignored Respondent's ineffectiveness of counsel claim and did not adjudicate it under 28 U.S.C. Section 2254(d)(1)?

(The Third Circuit held that de novo review was required.)

II. Has the interpretation given the standard of review employed in this case by subsequent Third Circuit decisions mooted the Commonwealth's argument for certiorari?

CORPORATE DISCLOSURE

Respondent has no corporate affiliations.

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Respondent Gerald Everett ("Everett") respectfully submits that the petition for a writ of certiorari should be denied. He previously secured an extension of time to file this Brief in Opposition which included December 12, 2002.

STATEMENT

Everett was convicted of first degree murder following a jury trial in early October of 1980. The Commonwealth established that he drove the get-away car, remained in the car while two men left the car, robbed a candy store, shot and killed the storekeeper, and returned to the car which Everett drove away.

The Commonwealth's theory which it repeatedly stressed throughout the trial was that Everett always remained in the car in what turned into a felony murder. The Commonwealth eyewitness testified that Everett was not one of the two persons in the candy store when the offenses occurred. Everett confessed to being the get-away car driver who waited in the car during the entire offense. There was no evidence presented that he intended to injure anyone, let alone kill anyone. The trial prosecutor conceded this several times. See Everett v. Beard, 290 f.3d 500 at 503 (3d Cir. 2002).

When Everett was tried, Pennsylvania statutory law divided murder into three degrees. First degree murder required a specific intent to kill; second degree murder was defined as felony-murder - a murder that occurred in furtherance of an enumerated felony, robbery being an enumerated felony; and third degree murder was a murder where there was an intent to inflict serious injury, but not to kill. See 18 Pa.C.S.A. Sections 2502 (a); 2502 (b); 2502 (c). Everett's habeas claim was that his trial counsel was ineffective because he failed to object to the court's

instructions which on 12 separate occasions informed the jury that it could convict him of being an accomplice to a first degree murder based solely on the actual slayer's intent and without any consideration for his own actual intent. Eleven months prior to Everett's trial, the Superior Court decided Bachert, 271 Pa. Super. 72, 412 A.2d 580 at 583 (1980)("Bachert I"). There, Justice Nix, a Pennsylvania Supreme Court justice sitting by designation in the Superior Court, relied on prior law and held that in order to convict an accomplice who has not inflicted the fatal blow of first degree murder, the evidence must establish - as an element of the crime - the fact that such accomplice shared the "specific intent to take life." Justice Nix held that the law required this intent to be an actual intent which was shared with the actual perpetrator and could not be imputed on a general conspiracy theory.

Bachert I was appealed to the Pennsylvania Supreme Court and overruled on other grounds, Commonwealth v. Bachert, 499 Pa. 398, 453 A.2d 931 (1982) (hereinafter "Bachert II") but reaffirmed on the requirement that an accomplice must be proven to share and individually harbor the specific intent to kill before he can be convicted of first degree murder.

Everett has always maintained that trial counsel should have objected to these instructions based on the Superior Court decision in Bachert I.

The court charged, without objection:

First: Murder of the first degree:

In order to find this defendant guilty of murder in the first degree, you must find that all of the following elements have been established by the Commonwealth beyond a reasonable doubt: One, that the defendant or an accomplice caused the death of another person -- in this case Mr. Jennings; that is, you must find that the death of Mr. Jennings would not have occurred but for the alleged acts of the defendant or his accomplices, if there are any in this case.

Two: that the killing was intentional..

A killing is willful and deliberate if the defendant and/or his accomplice, if there were any, consciously decided to kill the victim, and it is premeditated if the defendant or his accomplice, if there were any accomplices, possessed a fully informed intent to kill at the time when the killing took place, even though there need not have been any appreciable amount of time between the time when the defendant and/or the accomplice, if any, first conceived the idea of killing, and the time when the action took place.

An intentional killing, as I have defined it for you, may be found from any expressed words used by the defendant or his accomplice, if any

> exist, or may be implied from the words or conduct of the defendant or his accomplice.
>
> It should be noted that if the defendant or his accomplice, if any, intentionally used a deadly weapon, such as a gun, with bullets in it, on a vital part of the victim's body, you may infer from this fact, or these facts, that the killing was intentional, and therefore willful, deliberate and premeditated.
>
> If, after considering all the evidence you find that the Commonwealth has established each of these elements beyond a reasonable doubt, then you may find the defendant guilty of first degree murder. (N.T. 10/8/80 pgs. 5.34 to 5.36;CA 3 App. 69-71)(Emphasis supplied).

When the deliberating jury requested redefinitions of first, second and third degree murder the court substantially repeated the above instructions. (N.T. 10/8/80 pgs. 5.71 - 5.88; CA 3 App. 101-111)

The instructions given led the jury to convict Everett of first degree murder on a general conspiracy theory that held him responsible for the actions and intent of the slayer without any consideration of his own intent, and allowed the jury to impute the intent of the actual slayer to him.

This was done by the phrasing, repeated 12 times, that allowed Everett's conviction based on the jury's finding that "the defendant [Everett] or his accomplice" possessed and harbored the specific intent to kill.

Under Bachert I this was error, and it was error under Pennsylvania statutory law defining first degree murder as then, and as now, written. Pennsylvania courts have said this very clearly in Bachert I and in decisions predicated on Bachert I decided after Everett's trial. Where the state jury instructions posed the same due process deficiencies as in the instant case - Smith v. Horn, 120 F.3d 400,408(3rd Cir. 1997) - the Third Circuit has granted the Writ and reversed. The Pennsylvania Supreme Court has also reversed on the same ground or recognized the error ensconced in such jury instructions. Commonwealth v. Bachert, 271 Pa. Super. 72, 412 A.2d 580 at 583 (1980)("Bachert I"), reversed on other grounds, Commonwealth v. Bachert, 499 Pa. 398, 453 A.2d 931 (1982); Commonwealth v. Huffman, 536 Pa. 196, 638 A.2d 961 (1994); Commonwealth v. Chester, 557Pa. 358 at 380 n.12, 733 A.2d 1242 at 1253 n. 12 (1999); Commonwealth v. Wayne, 553 Pa. 614, 631, 632, 720 A.2d 456, 464 (1998).

Everett's early October 1980 trial was held eleven months after the Superior Court's decision in Bachert I, but before the Pennsylvania Supreme Court decision in Commonwealth v. Bachert, 499 Pa. 398, 453 A.2d 931 (1982)which reversed Bachert I on other grounds, but reaffirmed the Bachert I holding that the Commonwealth was required to prove, as an element of first degree murder as to an accomplice, that the accomplice shared and harbored the specific intent to kill with the actual slayer.

Everett's October 1980 trial antedated many of the later Pennsylvania Supreme Court decisions to be discussed herein. Nonetheless, Bachert I was decided eleven (11)

months prior to his trial and of course the statutory definition of first degree murder enacted in 1974 was in place.[1]

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[1] All of the later authorities are in agreement that Bachert II in reaffirming Bachert I did not make new law and that Huffman which relied on Bachert I and II did not make new law. See Commonwealth v. Chester, 733 A.2d 1242, 1253 n.12 (Pa. 1999) ("The holding of Huffman . . . did not create new law."); Commonwealth v. Wayne, 720 A.2d 456, 464 (Pa. 1998). This is so because the elements of first degree murder have not changed since the enactment of the statute defining it in 1974. Wayne, supra. at 464. The Commonwealth's position is that the elements of first degree murder in Pennsylvania were formulated and reformulated by case law and were different for those persons convicted of first degree murder prior to Huffman in 1994 than they were for those convicted since. This is untenable under any reading of the statute and is a result prohibited by Pennsylvania case law. Moreover, although the Commonwealth has argued that Bachert I and II made "new law" the Commonwealth never cited a case where under the "old law" a defendant had been convicted of first degree murder where his intent was imputed from the actual perpetrator's or where a defendant was convicted of first degree murder without a finding of his or her actual specific intent to kill beyond a reasonable doubt by his or her jury. Its argument that Bachert I and Bachert II created "new law" is directly contrary to Pennsylvania case law and always rang hollow. It is especially lacking in merit in view of the Pennsylvania Supreme Court's answer to this precise question certified to it by this Court in Fiore v. White, 531 U.S. 225, 228 (2001) which resulted in the Pennsylvania Supreme Court's response that "[n]ot every opinion creates a new rule of law." This is particularly so when the opinion involves the construction of a statute, and it either adopts a view of the statute "which was not wholly without precedent," id.; see also McCloskey v. WCAB, 501 Pa. 93, 460 A.2d 237, 239 n. 3 (1983) (decisions that do not "articulate a new rule but merely rel[y] upon a statutory interpretation which [is] not wholly without precedent, ... are treated as relating back to the original statute because they

In Pennsylvania the Superior Court is the only intermediate criminal appellate court. It is the court of direct review of all criminal cases except capital cases.[2] It sits in panels of three jurists.

Capital cases go directly to the Supreme Court of Pennsylvania. Its jurisdiction to hear and determine cases other than those resulting in the death sentence is through discretionary appeals otherwise known as its Allocatur jurisdiction (similar to certiorari).[3] It is estimated that the Pennsylvania Supreme Court grants appeals in less than 3% of the cases brought to it on Allocatur, and that 3% includes civil cases.

Thus, the vast majority of criminal cases will never reach the Supreme Court for a ruling on the merits.[4] The great mass of appellate review is done by the Superior Court with discretionary review rarely granted by the Pennsylvania Supreme Court.

Decisions of the Superior Court are both published and unpublished. Published decisions are binding on other panels of the Superior Court unless overruled en banc. Published

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are nothing more than interpretations of existing legislation"), or it involves the Court's first opportunity to construe the disputed provision. Fiore v. White, 562 Pa. 634, 757 A.2d 842 at 848.

[2] See 42 Pa. C.S.A. § 742.

[3] See 42 Pa. C.S.A. Section 724 (a)

[4] The denial of Allocatur is not a judgment on the merits and is not precedential. Commonwealth v. Tarver, 493 Pa. 320, 426 A.2d 569 at 575 (1981).

decisions are binding on the trial courts and counsel. Bachert I was a published decision.[5]

The Pennsylvania Superior Court in ruling on Everett's claims simply held that under state law, the Pennsylvania Supreme Court decision in Bachert II was not retroactive and could not apply to Everett's October 1980 trial. It completely ignored Bachert I. It did not even discuss whether or not Bachert II had made "new law."

It decided Everett's case on pure state law retroactivity grounds and held that because Bachert II was not decided until after Everett's trial, counsel could not have been ineffective. In its best light, the Superior Court decision in this case held that trial counsel could not have been ineffective for failing to object based on Bachert II.

But that was not Everett's ineffectiveness claim - his claim was that trial counsel was ineffective because he failed

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[5] Keblish v. Thomas Equip., Ltd., 541 Pa. 20, 28 , 660 A.2d 38, 42-43 (1995) the Pennsylvania Supreme Court held:

> ... it is well established that a Superior Court decision which has not been overruled or reversed is binding authority on this Commonwealth's trial courts. In re Townsend's Estate, 349 Pa. 162, 36 A.2d 438 (1944). In In re Townsend's Estate, we stated that 'a lower court has no right to ignore the latest decision of the Superior Court of this Commonwealth on an issue which has been squarely decided. Until that decision should be overruled by the Superior Court itself or overruled by the Supreme Court, it is still the law of this Commonwealth. Id at 168, 36 A.2d at 441.

to based on Bachert I. This claim was completely ignored by the state courts. Thus, Everett's ineffectiveness claim was not ruled upon by the state courts - for his claim was that eleven months prior to his trial Justice Nix authored Bachert I - a published Superior Court decision which was binding on all other Superior Court panels, the Pennsylvania trial courts and on counsel - which if cited would have prevented his being convicted of first degree murder.

Bachert I and the jury instructions given in Everett's case were in direct conflict. Trial counsel had the solemn obligation to object and employ Bachert I to Everett's advantage -and his failure to do so was outright ineffectiveness since it allowed Everett to be convicted of first degree murder where there was no evidence at all that he specifically intended to harm, let alone kill, the victim. Everett is totally innocent of first degree murder under Bachert I and all of the cases decided thereafter as there was no evidence of his intent to injure, let alone kill, anyone.

Because of the Superior Court's retroactivity analysis, it never evaluated Everett's ineffectiveness claim under Strickland that his trial counsel was ineffective for failing to object under Bachert I which was on the books eleven (11) months prior to his trial. This claim was not reviewed in any way by either the PCRA court or the Superior Court and the Third Circuit was obligated to review it de novo under 28 U.S.C. Section 2254(d)(1).

The language of section 2254(d)(1) expressly limits its application to claims that were "adjudicated on the merits in State court proceedings." If a claim was not "adjudicated on the merits" a federal court on habeas review is not obliged to employ either the "contrary to" or the "unreasonable application" standard of review which requires significant

deference to the state court decision and is obliged to employ the pre-AEDPA standard of de novo review of legal and mixed legal-factual rulings. Hudson v. Hunt, 235 F.3d 892, 895 (4th Cir. 2000); Miller v. Johnson, 200 F.3d 274, 281, n.4 (5th Cir..), *cert. denied* 531 U.S. 849 (2000)("[r]eview is de novo when there has been no clear adjudication on the merits"); Weeks v. Angelone, 176 F.3d 249, 258, 263 (4th Cir. 1999), aff'd on other grounds, 528 U.S. 225 (2000)(de novo standard applies to case because "Supreme Court of Virginia failed to address [petitioner's claim] on the merits"); DiBenedetto v. Hall, 272 F.3d 1, 6 (1st Cir.2001); Fortini v. Murphy, 257 F.3d 39, 47 (1st Cir.2001).

Reviewing the Bachert I ineffectiveness claim de novo, the Third Circuit found trial counsel ineffective under Bachert I for failing to register an objection on due process grounds to the court's jury instructions which were repeated no less than twelve(12) times and which each time invited the jury to convict Everett of first degree murder without regard to his own actual intent and based solely on the imputed intent of the actual slayer. Accordingly, the Third Circuit reversed Everett's murder conviction, but left his other convictions in place.

The Commonwealth of Pennsylvania seeks certiorari because it believes the Third Circuit applied an incorrect standard of review. The Commonwealth is wrong.

REASONS FOR DENYING THE WRIT

I. THIS COURT SHOULD DENY CERTIORARI BECAUSE THE THIRD CIRCUIT ACTED PROPERLY IN REVIEWING EVERETT'S CLAIM DE NOVO.

Everett's entire state claim and hence his federal habeas claim revolved around Bachert I and his counsel's ineffective failure to use it to his advantage at trial. By failing to object to the court's accomplice instructions - given 12 times - trial counsel allowed Everett to be convicted of first degree murder by his jury based solely on the actions and intent of the actual slayer without any consideration of Everett's actual intent. Because these instructions eliminated, the most critical element in the crime of first degree murder - the harboring, possessing and sharing of the specific intent to kill they comprised a due process violation and trial counsel should have objected on due process grounds based on Bachert I. Absent a specific intent to kill no one in Pennsylvania can be convicted of first degree murder and this was true under the statute defining first degree murder which was enacted in 1974 - the statute Everett was convicted of violating.

Justice Nix clearly held this in Bachert I, 271 Pa. Super. 72, 412 A.2d 580 at 583 (1980):

> All theories of vicarious responsibility for criminal conduct require the existence of a shared criminal intent. The nexus which renders all members of a criminal conspiracy responsible for the acts of any of its members is the unlawful agreement. Commonwealth v.

> Cox, 466 Pa. 582, 353 A.2d 844 (1976); Commonwealth v. Yobbagy, 410 Pa. 172, 188 A.2d 750 (1963); Commonwealth v. Neff, 407 Pa. 1, 179 A.2d 630 (1962). Since first degree murder requires the existence of a specific intent to take life, the evidence must show that the shared intent included the design to take the life of the victim. In this case, that element is missing and we are constrained to conclude that the Commonwealth failed to support the verdict of murder of the first degree.
>
> .....
>
> In contrast, while there is evidence that instant appellant shared the intent to rob and to kidnap the victim and subsequently to take his vehicle, there is no showing that appellant and his co-defendant shared the intent to take the life of the victim.... We therefore hold that the evidence was in fact insufficient to establish first degree murder and that the appellant must be discharged as to that charge. Bachert I at 412 A.2d 584.

The elimination of the most critical element of first degree murder from the Commonwealth's burden of proof was a due process violation at the time of Everett's trial. See

In the Matter of Winship, 397 U.S. 358, 363 (1970);[6] Sandstrom v. Montana, 442 U.S. 510, 526 n.13 (1979).

In denying Everett relief, the Superior Court held:

> In 1994, the Pennsylvania Supreme Court decided the case of Commonwealth v. Huffman, 536 Pa. 196, 638 A.2d 961 (1994). In Huffman, the Court held that when giving a jury charge on accomplice liability for a crime involving specific intent to kill, the jury must consider the mental statement of the accomplice and not depend only upon proof of the principal's intent to kill. Huffman, supra; see also Commonwealth v. Bachert, 499 Pa. 398, 453 A.2d 931 (1982). As the Honorable David Savitt has has [sic] cogently explained in his opinion, the Huffman case was decided in 1994, and the Bachert decision was filed on December 17, 1982, both after the appellant's trial, conviction, and completion of direct appeal. The general rule of retroactivity, therefore, is not applicable. See Commonwealth v. Gillespie, 512 Pa. 349, 516 A.2d 1180 (1986)(general rule of retroactivity does not apply to any case on collateral appeal unless the decision was handed down during the pendency of the defendant's direct appeal).

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[6] "Lest there remain any doubt about the constitutional statute of the reasonable doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Winship, supra. at 397 U.S. 364 (1970).

See also Commonwealth v. Beasley, [---] Pa. ---, 678 A.2d 773 (1996)(counsel cannot be found ineffective for failing to raise a meritless objection at time of trial or for failing to predict legal developments); Commonwealth v. Fahy, 537 Pa. 533, 645 A.2d 199 (1994)(Pet. App. 59).

The Superior Court's analysis consisted of the statement that Commonwealth v. Huffman, 536 Pa. 196, 638 A.2d 961 (1994) held that an element of the crime of first degree murder as to an accomplice is the presence of a specific intent to kill harbored by the accomplice which cannot "depend only upon proof of the principal's intent to kill." It then held that because Huffman was decided after Everett's trial, and direct appeal it could not be retroactively applied to Everett on collateral attack.

The Superior Court and the PCRA court totally ignored the due process component of Everett's ineffectiveness of counsel claim which was that at the time of Everett's trial a reasonably competent attorney would have objected to the court's instructions based on due process grounds - because those instructions eliminated the most critical element of the crime of first degree murder as to an accomplice - actual possession of a specific intent to kill.

The Third Circuit did apply Strickland. The Third Circuit stated, "Strickland teaches that the standard by which counsel is to be judged is that of 'a reasonably competent attorney,' 466 U.S. at 687," at the time. Everett, 290 F.3d at 509. Here, in particular, Strickland asks whether "a reasonable competent attorney" at the time of trial would have objected to the jury instructions on due process grounds. As the Third Circuit explained, the answer to that question

depends critically on "the state of the law" at the time of trial. Everett, 290 F.3d at 509. The Third Circuit therefore "focus[ed] upon the state of the law at the time of Everett's trial" in 1980 and, after describing that law, concluded that a "reasonably competent attorney" who was "prepared for trial of an accomplice in a first-degree murder in 1980 should have known" to make the requisite objection. Everett, 290 F.3d at 509, 513. Because counsel failed to make this objection, his performance was deficient under Strickland.

The state courts, on the other hand, did not apply a Strickland analysis at all. The state courts did not ask if "a reasonably competent attorney" would have objected, and did not survey the legal landscape at the time of trial to determine if "the state of the law" at the time of trial required an objection. Instead, the state courts merely noted that the Pennsylvania Supreme Court decided Bachert and Huffman after Everett's trial and summarily concluded that "trial counsel cannot be held ineffective for failing to raise an issue which was not the law at the time," App. 63 (Court of Common Pleas opinion), or "failing to predict legal developments," App. 59 (Superior Court opinion).

The state courts' "analysis," however, simply begs the question that, under Strickland, should be "central to an evaluation of counsel's performance," Everett, 290 F.3d at 509 – did the Pennsylvania Supreme Court in Bachert and Huffman announce a new rule that "was not the law at the time," App. 63 or that counsel would have had to "predict," App. 59, or did they simply articulate a rule that a reasonably competent attorney would have known at the time of trial? The Third Circuit asked, evaluated and answered this question; the state courts did not.

Bachert I, Bachert II and Huffman, supra. did not articulate "new law." See footnote 1, supra.; Fiore v. White, 531 U.S. 225, 228 (2001); Fiore v. White, 562 Pa. 634, 757 A.2d 842 at 848 (2000).

Because the state courts did not even attempt to answer this question that is "central to" a Strickland analysis, they did not apply Strickland, and federal review is de novo, as the Third Circuit held. At the very least, the state court decision is contrary to and/or an unreasonable application of Strickland, requiring relief under § 2254(d).[7]

At the time of his trial Bachert I was the leading decision which explicated the elements required to convict an accomplice of first degree murder, and it did so quite clearly, being written by Justice Nix of the Pennsylvania Supreme Court who sat by designation. Bachert I was a published decision and as such was binding on other Superior Court panels and the trial courts. See Keblish v. Thomas Equip., Ltd., 541 Pa. 20, 28 , 660 A.2d 38, 42-43 (1995), supra. at note 5. Bachert I was reaffirmed on the issue involved in Everett's claim in Bachert II and Commonwealth v. Huffman, 536 Pa. 196, 638 A.2d 961 (1994) rested entirely on both Bachert I and Bachert II.

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[7] The Commonwealth tries to make much of the fact that the state court cited Commonwealth v. Pierce, 527 A.2d 973 (Pa. 1987), and asserts that the Pierce standard is identical to Strickland. While the state courts cited Pierce, it did not figure into their analysis. Instead, they denied the claim simply because Bachert and Huffman were decided after this trial, as stated above. Thus, even if Pierce is consistent with Strickland, there was no application of Strickland here.

Instead of evaluating the impact of Bachert I on Everett's claim, the Superior Court (and the PCRA Court) alchemized Everett's claim that trial counsel was ineffective for failing to object to the instructions based on Bachert I into a claim that trial counsel was ineffective for failing to object to the instructions based on Bachert II. Everett never raised a claim under Bachert II - and by unilaterally transforming his claim in such a manner, the state courts did not adjudicate his claim on the merits. The state courts did not apply Strickland to Everett's claim.

By ignoring Bachert I, the Superior Court, as well as the PCRA Court, made no effort to analyze Everett's actual claim under Strickland's performance prong as of the time of Everett's trial - indeed 11 months prior to Everett's trial Bachert I had been decided. The Third Circuit undertook just such an analysis, and found that trial counsel was quite ineffective because no counsel defending a first degree murder case where his client was an accomplice could ignore or overlook Bachert I.

Bachert I had been on the books eleven (11) months prior to Everett's October 1980 trial. It was the pole star of his ineffectiveness claim and of any ineffectiveness analysis. It was completely ignored - in spite of the fact that Everett had always urged Bachert I as the basis for reversal in his PCRA Petition and in his habeas proceeding - as United States Magistrate Judge Diane Welsh, who was initially assigned to this case, found upon a review of the record. Magistrate Judge Welsh found that Everett had presented his Bachert I claim to "all levels of Pennsylvania courts." (Magistrate's Opinion note 3, Pet. App. 47).

Yet, all levels of Pennsylvania state courts ignored Bachert I, and by so doing ignored the impact that the

Superior Court's decision in Bachert I had on his federal ineffectiveness claim.

The Third Circuit found that Bachert I had substantial impact on Everett's claim because it established that the most critical element of the crime of first degree murder (his specific intent to kill) was omitted from his jury's consideration under the instructions given by the trial court on 12 different occasions and that there was not only no evidence to show that Everett intended to injure let alone kill anyone, but that the prosecutor had conceded these facts to Everett's jury several times.

The analysis and standard of review used by the Third Circuit was unquestionably correct.

II. EVERETT HAS BEEN NARROWLY CONSTRUED BY THE THIRD CIRCUIT SO IT IS CLEAR THAT IT IS NOT, AS URGED BY THE COMMONWEALTH, THE RULE OF THE CIRCUIT, BUT A STEP IN THE FORMULATION OF THE RULE OF THE CIRCUIT.

Everett itself was not erroneously decided as shown in Argument I.

Nonetheless, it has been narrowly construed by the Third Circuit so that it is not, as the Commonwealth fears, the law of the Circuit. In Marshall v. Hendricks, 307 F.3d 36, 69 (3d Cir. Sept. 11, 2002), the Third Circuit applied AEDPA's 2254(d) review where the state court relied solely on its own precedent and failed to cite or discuss any federal law:

> When evaluating Marshall's claims, the New Jersey Supreme Court cited not to federal law, but to New Jersey precedent, State v. Ramseur, 106 N.J. 123, 524 A.2d 188, 290 (1987), for its standard of constitutional error. Ramseur itself cites to earlier New Jersey law, rather than the applicable United States Supreme Court jurisprudence. Rather than dwell on the New Jersey Supreme Court's error in applying its own precedent, however, we believe AEDPA review requires a more nuanced approach in this situation. Because we are examining to see whether the New Jersey Supreme Court's analysis "resulted in a decision" that was either "contrary to, or involved an unreasonable application of, clearly established Federal law," we believe that any error that we find in the approach or specific analysis of the Court must be tempered by our overall assessment as to whether the result it reached is in fact consistent with Supreme Court precedent. See 28 U.S.C. § 2254(d).

The Third Circuit in Marshall, at note 18 specifically distinguished Everett:

> We note that this situation is distinguishable from our recent case of Everett v. Beard, 290 F.3d 500, 507-08 (3d Cir. 2002), in which we held that the state court's ruling should not be analyzed under the AEDPA standard of review because it was not "clear from the face of the state court decision that the merits of the petitioner's constitutional claims were

> examined in light of federal law as established by the Supreme Court of the United States." Id. (emphasis omitted). In Everett, the Pennsylvania courts did not address the petitioner's due process claim at all, and analyzed his ineffectiveness claim not under a Strickland analysis, but under standards set by its own precedent, different from those enunciated in Strickland. Rather than asking whether counsel's performance was objectively reasonable, the court inquired whether the underlying claim was meritorious, then whether "the course of action chosen by his counsel had no reasonable basis designed to effectuate the client's interests," and, finally, whether the defendant was prejudiced. Id. at 506-07. By contrast, here the New Jersey Supreme Court examined the merits of Marshall's claims and measured them against a standard that was consistent with federal law.

Similarly, in the other opinions in which the Third Circuit has cited Everett, it has read it narrowly. See Hunterson v. DiSabato, 308 F.3d 236, 245, note 9 (3d Cir. Oct. 10, 2002) (claims that Parole Board was biased and thus violated due process reviewed under § 2254(d) where state court "measured them against a standard that was consistent with federal law and found that the allegations of bias would not have affected the outcome."); See Marshall v. Hendricks, supra. note 18 (3d Cir. 2002) (stating that, in Everett, the state court decision was not analyzed under the AEDPA standard of review because the court had applied the incorrect legal standard under federal law)."); Chadwick v. Janecka, F.3d (3d Cir. 2002) (claim is subject to § 2254(d) review when the state courts summarily denied it without any

explanation; rejecting petitioner's argument that Everett requires de novo review).

Thus, the law in the Third Circuit is that a state court decision that applies a "standard that [is] consistent with federal law," Marshall; Hunterson, is reviewed under § 2254(d) even if the state court does not cite any federal cases and, instead, relies solely on its own precedent that makes no reference to federal law. Given this, the Commonwealth's certiorari question ("Where a state court rejects a claim of trial counsel's ineffectiveness, relying on state court opinions rather than federal cases – but applying a legal standard identical to federal requirements – has the state court 'adjudicated' the ineffectiveness claim within the meaning of the federal habeas statute [§ 2254(d)] ...?"), has already been answered in the affirmative by the Third Circuit so that this Court by granting certiorari here cannot alter the rule employed in the Third Circuit.

Because Everett has been limited by subsequent interpretations so as to assuage the Commonwealth's fears which were expressed in its certiorari petition, this Court should deny certiorari because granting it would have no significance beyond this immediate case.

CONCLUSION

For the above reasons certiorari should be denied.

Respectfully submitted,

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